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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLARD RICHARDS,
Petitioners,

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al.,
Respondents.

Petition for a Writ of Certiorari

To the United States Court of Appeals
for the Ninth Circuit

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To the United States Court of Appeals for the Ninth Circuit:

Petitioners Marine Cooks & Stewards, AFL, a voluntary unincorporated association, James O. Willoughby, Virgil Rogers and Willard Richards, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 6, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of April 6, 1959, printed in Appendix B hereto, infra, Appendix page 5, is reported at 265 F.2d 780. The opinion of June 29, 1959, denying rehearing printed in Appendix C hereto, infra, Appendix page 19, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959 (R. 142) Appendix page 21, infra. A timely petition for rehearing was filed on May 4, 1959, and was denied on June 29, 1959 (R. 156) Appendix page 19, infra. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1). The jurisdiction of the District Court was invoked under 28 U.S.C., Section 1331 on a claim that the matter in controversy arose under the laws of the United States.

QUESTIONS PRESENTED

The basic question is whether or not a United States District Court exercising jurisdiction under 28 U.S.C., Section 1331 may enjoin peaceful picketing of a foreign registered vessel afloat in an American port.

The following subsidiary questions are presented in determination of the ultimate question:

1. If such picketing be a maritime tort, may it be enjoined by the United States District Court or is jurisdiction of this admiralty cause of action lacking under the decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)?

2. If such picketing constitutes a maritime tort and if *Romero* is not controlling, may a United States District Court enjoin such peaceful, non-fraudulent picketing notwithstanding the provisions of the Norris-LaGuardia Act,

29 U.S.C., Sections 101-115; and the anti-injunction provisions of the Clayton Act, 29 U.S.C., Sections 52-53?

3. Is such peaceful picketing of a foreign vessel by an American union in protest against the substandard wages, hours, and working conditions on the foreign vessel resulting in loss of employment to the picketing unions' members, a violation of the maritime law of the United States?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C., Section 1331 upon which plaintiffs below predicated jurisdiction of the District Court; the Norris-LaGuardia Act, 29 U.S.C., Sections 101, 104, 107 and 113, and the Clayton Act, 29 U.S.C., Sections 52 and 53. They are printed in Appendix A, infra, Appendix pages 1 to 4.

STATEMENT

On June 13, 1957, respondents (plaintiffs below) filed their complaint on the civil side of the United States District Court for the Western District of Washington, Southern Division, seeking damages and an injunction (R. 3-10). An order to show cause for preliminary injunction (R. 22-23) came on regularly for hearing on June 15, 1957, (R. 50 et sequitur) and on June 19, 1957, findings of fact and conclusions of law were made by the District Court (R. 30-39) and a temporary injunction granted (R. 40-43).

The petitioner, Marine Cooks & Stewards Union, hereinafter sometimes referred to as MCS, was enjoined from picketing the *SS Nikolos* or any other vessel registered under a foreign flag and manned by an alien crew and owned, operated or chartered by the plaintiffs while in the Puget Sound area (R. 40-43).

The MCS, pursuant to certification of the National Labor Relations Board, represents employees of the Stewards Department on a large majority of vessels flying the American flag on the Pacific Coast (R. 24-25). Other petitioners are officers, or members of the MCS. On June 10, 1957, the *SS Nikolos*, flying the Liberian flag, arrived at Tacoma, Washington, with a cargo of salt for a chemical company at Tacoma, Washington (R. 32-33). The cargo of salt had been loaded at Black Warrior Lagoon on the Pacific West Coast of Mexico, a few hundred miles south of the United States border (R. 32). The *SS Nikolos* is owned by the Panama Steamship Company, Ltd., a foreign corporation (R. 31) and was time chartered to Seatankers, Inc. (R. 31), a foreign corporation wholly owned by National Bulk Carriers, an American corporation (R. 90). Another wholly owned foreign subsidiary of National Bulk Carriers, Transea Carriers, had contracted with the consignee of the salt, Hooker Electro-Chemical Company of Tacoma, Washington, for the transportation of salt from Black Warrior Lagoon to the Hooker plant at Tacoma (R. 89-90). Transea Carriers in turn had a contract of affreightment with Seatankers, Inc. (R. 90). Seatankers, Inc., had chartered the *Nikolos* from the North Atlantic & Gulf Steamship Company whose corporate status is not established (R. 90) which in turn had chartered the *Nikolos* from the Panama Steamship Company, a Liberian corporation (R. 90-91). The master and the crew of the *SS Nikolos* were aliens, mostly Greek (R. 13).

The *SS Nikolos* pays less than one-fifth of the going wages under union contract (R. 26-27). As a result of the entry of the *SS Nikolos* into the trade from Mexico to Tacoma, Washington, vessels of American registry operated and manned under contract with the defendant MCS

have lost or will lose such business with resultant loss of employment to members of the MCS (R. 36-37).

Upon arrival of the *Nikolos* in Tacoma, Washington, on June 10, 1957, a small outboard vessel named the *Will-O-Bee* approached the *Nikolos* at anchor displaying a picket-boat sign. The *Will-O-Bee* was operated by petitioner James O. Willoughby, Seattle Port Agent of the MCS, who notified the master of the *Nikolos* that the MCS was picketing the ship (R. 33). The *Will-O-Bee* thereafter continued to picket by cruising around the *Nikolos* (R. 33).

There was no fraud or physical violence to persons or tangible property or threats thereof by the petitioners or any of them (R. 36).

The respondent owners or charterers, plaintiffs below, have entered into and are seeking other contracts of affreightment for carriage of like cargoes from Mexican ports to the United States ports in the Puget Sound area and to the particular consignee of this cargo (R. 35).

The District Judge was of the opinion that petitioner's conduct constituted unlawful interference with foreign commerce with a friendly foreign nation and that no labor dispute existed within the meaning of the Norris-LaGuardia Act.

The statutory basis for the jurisdiction of the District Court was not stated by the plaintiff nor the District Court.

The petitioner promptly after granting of the temporary injunction on June 19, 1957, filed notice of appeal on July 1, 1957, and the case was argued before the court of appeals on January 15, 1958 and reargued on September 15, 1958.

The court below affirmed the order of the District Court despite the intervening decision of this court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The court of appeals determined that an action on the civil side of a district court requesting an *equitable* remedy for

a maritime tort may be brought under Section 1331 although an action seeking a common law remedy on the maritime tort may not be brought on the civil side. The court of appeals further held that the prohibitions of the Norris-LaGuardia Act did not deprive the District Court of jurisdiction by reason of the holding of this court in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

Petitioners promptly sought rehearing which was denied on June 29, 1959.

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

1. The Decision of the Court of Appeals Is Directly Contrary to the Controlling Decision of This Court in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

There is no disagreement as to the following:

(a) If there is a cause of action in this case it is one for maritime tort.

The majority opinion of the Court of Appeals says:

> "* * * Appellees' cause of action is based on interference with maritime traffic on navigable waters and on interference with the performance of a maritime contract *constituting maritime torts*." (Emphasis supplied.)

The concurring opinion in the Court of Appeals says:

> "Here the relief sought was injunction *against a maritime tort*." (Emphasis supplied.)

(b) Appellees' sole claim to jurisdiction rests upon the provisions of 28 U.S.C., Section 1331, giving the United States District Court jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Respondents disclaimed any other basis of jurisdiction of the District Court.

The Court of Appeals noted in its opinion:

> "Appellee rests his claim of jurisdiction on 28 USCA § 1331 * * *" (R. 145-6)

(c) This court held in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), that an action at law cannot be brought under Section 1331 on the civil side of a United States district court on a cause of action on a maritime tort.

The court below has concluded that an action on the civil side of the court requesting an equitable remedy rather than a common law remedy based on a maritime tort can be brought under Section 1331.

The court below reasoned that this is not a "case of admiralty and maritime jurisdiction" as that language is used in 28 U.S.C., Section 1333 or Article III of the Constitution but is instead a "case" in equity because an injunction is sought even though Federal question jurisdiction is predicated solely on a claim of maritime tort.

This court in *Romero* decided that if the suit involved a maritime claim, i.e., a maritime tort, it was a case of admiralty and maritime jurisdiction. This court specifically pointed out that this was so regardless of the remedy sought by the pleader. This language is to be found in footnote 23 to the majority opinion in the *Romero* decision.

> "All suits involving maritime claims, *regardless of the remedy sought*, are cases of admiralty and maritime jurisdiction within the meaning of Article 3 whether they are asserted in the Federal courts, or under the saving clause, in the state courts." (Emphasis supplied.)

The court below failed to consider that there is no grant of jurisdiction, equitable or otherwise, to the United States District Courts over "maritime torts" as such. The only

grant of jurisdiction over maritime torts is in Section 1333, over "any civil case of admiralty or maritime jurisdiction." To deny that this is a "case of admiralty and maritime jurisdiction" is therefore to deny that it falls within any grant of judicial authority to the Federal courts.

The majority decision of the Court below states:

> "We emphasize, this is not an action 'saved' from the exclusive jurisdiction of admiralty; it is one never cognizable in admiralty." 265 F.2d at 783.

If this be so, the plaintiffs here had no Federal claim at all, for their only claim to Federal jurisdiction is that the case *is* cognizable in admiralty. This Court made this same observation in footnote 23 to the majority opinion in *Romero*, saying:

> "Without that Constitutional grant *Romero* would have no Federal claim to assert."

In *Romero*, the plaintiffs sought a jury trial not available in admiralty and for that reason urged jurisdiction on the law side of the Federal Court where a jury trial would be available. Similarly, plaintiffs in our case seek an injunction not available in admiralty and base their claim for jurisdiction on the law side solely because only there may the remedy of injunction be given. Jurisdiction is not conferred in such a fashion.

The result reached by the court below is that if the remedy sought on a maritime tort is the equitable remedy of an injunction, the jurisdiction of the district court under Section 1331 is different and greater than a similar action on the civil side of the court seeking a common-law remedy on a maritime tort. Congress made no distinction in Section 1331 between the jurisdiction of the court sitting in equity or sitting in law. The statute presently grants juris-

diction to the court of "all civil actions wherein the matter * * * arises under the * * * laws * * * of the United States." However, in the original Act of 1875, as quoted by this Court in the *Romero* decision (358 U.S. 354, 359), the Act granted jurisdiction over "suits of a civil nature at common law or in equity." The jurisdictional grant of the statute was identical as to actions in equity and at law. The change to the words "all civil actions" was made solely because of the adoption of Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between actions at law and in equity. See reviser's notes to 28 U.S.C., Section 1331.

It must follow therefore, that the jurisdiction of the District Court on the civil side is not enlarged because an equitable remedy is sought.

A litigant asserting jurisdiction under Section 1331 must designate the "law of the United States" under which his suit arises whether the remedy sought be legal or equitable. In the *Romero* case, this court has said that claims rooted in Federal maritime law are not cases arising under the laws of the United States within the meaning of Section 1331.

The respondents' claim to jurisdiction under Section 1331 therefore must fail, and the contrary decision of the Court of Appeals cannot be reconciled with the decision of this Court in the *Romero* case.

2. This Case Involves the Important Question, Not Heretofore Decided by This Court, of the Applicability of the Norris-LaGuardia Act and the Clayton Act to Labor Disputes Involving Ships of Foreign Registry.

The court below believed the Norris-LaGuardia Act was inapplicable solely because of the decision of this Court in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

This is a question which has not been but should be determined by this Court.[1]

The petitioners' peaceful picketing grew out of a labor dispute as defined by this court's decisions in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 (1940). A result contrary to the decision below was reached by the U.S. District Court for the Southern District of New York in *Afran Transport Co., v. National Maritime Union*, 169 Fed. Supp. 416 (1958).

Petitioners believe this court's decision in *Benz* does not foreclose applicability of the Norris-LaGuardia Act to the present dispute. Although the *Benz* case involved picketing of a foreign vessel by an American union, this is the only point of similarity. The differences, both factual and legal, between this case and the *Benz* case render the *Benz* decision inapplicable to the case at bar.

The *Benz* case as decided by this court involved an action for damages, not an injunction. In *Benz*, this court held that the Taft-Hartley Act did not apply to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily in an American port. This court said:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

1. The Norris-LaGuardia question did not reach this court in the *Benz* case as the appeal from the temporary injunction was dismissed by the Court of Appeals since the question had become moot with the sailing of the ship. *Benz v. Compania Naviera Hidalgo*, 205 F.2d 944, cert. den. 346 U.S. 885 (1953).

The petitioners here were vitally affected by the intrusion of the *Nikolos* with its substandard wages and working conditions in a trade previously employing petitioners' members. The petitioners by their picketing were protesting the effect on their membership of the economic invasion of the foreign-registered *Nikolos*. In *Benz*, the picketing unions had no dispute with the foreign owners. Furthermore, American connection with the dispute in the present case is established in the record while in *Benz* no American interest was shown.

An American corporation could not secure an injunction under the facts shown in this record. The foreign plaintiffs (one a wholly owned subsidiary of an American corporation) seek the protection of federal maritime law but desire exemption from the procedural limitations on the availability of the injunctive remedy which apply to American litigants. The *Benz* case imports no general grant of additional remedies for foreign shipowners not available to American shipowners.

The *Benz* case decided only one issue, the applicability of the Taft-Hartley Act, where it was claimed that the federal remedy provided by that law pre-empted a claim for damages.

A determination as to applicability of the Taft-Hartley Act is not controlling in deciding applicability of the Norris-LaGuardia Act. The Taft-Hartley Act is based on the power of Congress to regulate commerce, whereas the Norris-LaGuardia Act is based on the plenary power of Congress to control District Court jurisdiction. The Taft-Hartley Act is a complete regulatory act, whereas the Norris-LaGuardia Act simply forbids granting of a particular remedy by the United States District Courts.

In *Benz*, damages were awarded for a violation of the law of Oregon, jurisdiction being based on diversity. In

the present case, the plaintiffs below relied exclusively on federal maritime law to establish their claim of wrongful picketing. The tort in *Benz* was based solely on Oregon law while the asserted wrong in the present case is predicated exclusively on the claimed violation of a law of the United States. Jurisdiction in the court below could not exist under Section 1331 unless petitioners' conduct was a violation of a law of the United States.

The court below we believe has misinterpreted the scope and meaning of this court's decision in the *Benz* case. The *Benz* decision has little or no bearing on the question of the applicability of the Norris-LaGuardia Act to controversies such as this because:

(1) The reach of the Norris-LaGuardia Act is not to be equated with that of the Taft-Hartley Act. Each springs from a different source of Congressional power and they are entirely different forms of legislation.

(2) The factual differences between *Benz* and the present case are such that the Norris-LaGuardia Act would apply here, even if not there.

(3) The *Benz* case was decided on the basis of Oregon law. The decision of the courts below that petitioners' conduct was in violation of a law of the United States ignores the applicable sections of the Clayton Act. This problem was not and could not have been involved in the *Benz* case.

The error of the court below is compounded by the court's assumption that petitioners' peaceful picketing was in violation of a "law of the United States." There is no decision of any court holding that peaceful picketing of a foreign vessel violates the maritime law of the United States and the contrary holding of the court below ignores the express

language of the Clayton Act. This court has said in *United States v. Hutcheson*, 312 U.S. 219, 236 (1940), with reference to Section 20 of the Clayton Act: "In this light section 20 removes all such allowable conduct (i.e., peaceful picketing) from the taint of being 'violations of any law of the United States', including the Sherman Law." The Clayton Act expressly applies to foreign corporations (38 Stat. 730, 29 U.S.C., Section 53). The conclusion follows that petitioners' conduct in picketing peacefully is not contrary to any law of the United States.

A determination of the legality of the petitioners' peaceful picketing of a foreign vessel under the law of the United States and the power of the District Court to enjoin such picketing raises questions of great importance in light of conditions existing today in the maritime industry.

The applicability of the Norris-LaGuardia Act and the Clayton Act to controversies such as the present involves fundamental questions which must ultimately be decided by this court in the proper exercise of its supervisory authority over the lower Federal Courts.

3. Resolution of the Issues of Law Presented by This Petition Are Fundamental to the Further Conduct of This Case.

The ultimate question presented herein is the power of the District Court to issue an injunction in this kind of labor dispute. The mischief of injunctions in labor controversies is well known. The harm is done when the interlocutory order is issued. The damage is often irreparable. The assertion by the district court of power to act in an interlocutory way is final. Whether it has that power may (and should) be determined without reference to any future proceedings which may be taken. To allow the district court to act in an interlocutory way while lacking jurisdiction would permit the district court to interfere with

a labor controversy in a way, which though interim in form, irretrievably alters the status of the dispute or, in fact, determines it. The voice of protest is stilled by injunction and the protested wrong is accomplished.

This court has frequently granted certiorari to consider fundamental and important questions decided on an interlocutory order where the questions determined are controlling in the future conduct of the case.

Bakery Sales Drivers, Local Union No. 33 v. Wagshal, 333 U.S. 437 (1948);

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685 n. 3 (1949);

Land v. Dollar, 330 U.S. 731, 734 n. 2 (1947);

U.S. v. General Motors Corp., 323 U.S. 373, 377 (1945);

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52 (1938);

American Construction Co. v. Jacksonville T. and K. W. R. Co., 148 U.S. 372 (1893).

The issues presented here are fundamental and controlling in the future conduct of this case in at least these respects:

1. If the District Court lacks jurisdiction under Section 1331, the action must be dismissed because no other claim to jurisdiction of the United States District Court is made.

2. The Court's determination as to the applicability of the Norris-LaGuardia Act will control as to the issuance of a permanent injunction as well as the temporary injunction (29 U.S.C., Sections 104, 107).

3. If the Norris-LaGuardia Act is applicable then the provisions of the Clayton Act are likewise applicable. That act immunizes the conduct here engaged in by the following language:

> "* * * Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." (29 U.S.C., Section 52)

The Clayton Act, if applicable, would require dismissal of the complaint, because the picketing may not be held to violate any law of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN PAUL JENNINGS
J. DUANE VANCE
Counsel for Petitioner

Dated: September 11, 1959.

(Appendices Follow)

Appendix A

TITLE 28 U.S. CODE, SECTION 1331

Section 1331. *Federal question—Amount in controversy.* —The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. (June 25, 1948, c. 646, § 1, 62 Stat. 930.)

NORRIS-LaGUARDIA ACT (TITLE 29, U.S. CODE)

Section 101:

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; * * *"

Section 104:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:"

"(c) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; * * *"